MUSCOGEE (CREEK) NATION

v.

MUSKOGEE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 94-99-A, 94-132-A Decided May 18, 1995

Appeals from decisions concerning the payment of medical bills from an Individual Indian Money account.

Affirmed.

1. Bureau of Indian Affairs: Administrative Appeals: Generally

In deciding an appeal pending before him or her, a Bureau of Indian Affairs official has the authority and the responsibility to consider all statutory and regulatory provisions relevant to the matter at issue, whether or not the appellant has relied upon those provisions.

2. Indians: Financial Matters: Individual. Indian Money Accounts--Indians: Trust Responsibility

In determining what claims may be paid from an Individual Indian Money account, the Bureau of Indian Affairs is bound by the trust responsibility of the United States toward the individual Indian for whom the funds are held.

3. Board of Indian Appeals: Jurisdiction--Administrative Procedure: Standing

A Bureau of Indian Affairs ruling concerning an appellant's standing is a legal conclusion subject to full review by the Board of Indian Appeals, even though it is part of an otherwise discretionary decision made by the Bureau.

4. Estoppel--Indians: Financial Matters: Individual Indian Money Accounts

The Board of Indian Appeals will not find estoppel against the Bureau of Indian Affairs where the party advocating estoppel seeks payment from funds held in an Individual Indian Money account.

APPEARANCES: Leah Harjo Ware, Esq., Attorney General, Muscogee (Creek) Nation Okmulgee, Oklahoma, for appellant; Charles R. Babst, Jr., Esq., Office of the Field Solicitor, U.S. Department of the Interior, Tulsa, Oklahoma, for the Area Director.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Muscogee (Creek) Nation seeks review of a February 25, 1994, decision of the Muskogee Area Director, Bureau of Indian Affairs (Area Director; BIA), and a May 24, 1994, decision of the Acting Area Director, both concerning requests for payment of medical bills from the Individual Indian Money (IDA) account of Eastman Richard, Jr. For the reasons discussed below, the Board affirms both decisions.

Background

Eastman Richard, Jr., was a full-blood Creek Indian born on September 2, 1913. He inherited oil producing properties in his youth. In 1934, a guardian was appointed for him in Oklahoma State court (State court). 1/ He remained under guardianship until his death on December 16, 1993. His final guardian, Albert R. Matthews, was appointed on July 13, 1977.

By 1993, Richard was in poor health. He was then living in Muskogee, Oklahoma, with his wife Radene, to whom he had been married for 26 years. The couple's home was located on fee land within the territory of the Cherokee Nation. Richard had four children by a previous marriage or marriages.

On or about September 21, 1993, members of Richard's family contacted appellant's Children and Family Services Administration (CFSA) to express concern that Richard was being abused and/or was not receiving proper medical care in his home. On September 22, 1993, a meeting was held to discuss the matter. The meeting was conducted by the manager of the CFSA and was attended by Richard's sister, some or all of his children, and other family members. Also present was the Superintendent, Okmulgee Agency, BIA. There was discussion at the meeting concerning the payment of anticipated medical bills from Richard's IIM account. However, as discussed further below, there is disagreement between appellant and the Superintendent as to what the Superintendent said at the meeting concerning such payments.

At about 9:30 p.m. on September 23, 1993, at the application of the CFSA, a judge of appellant's district court (Tribal court) issued

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1/ Guardianship of members of the Five Civilized Tribes is now governed by section 3 of the Act of Aug. 4, 1947 (1947 Act), 61 Stat. 731, which provides: "(a) The State courts of Oklahoma shall have exclusive jurisdiction of all guardianship matters affecting Indians of the Five Civilized Tribes."

In 1934, the relevant statute was the Act of May 27, 1908, 35 Stat. 312.

an emergency temporary custody order and a pick-up order. 2/ Pursuant to these orders, CFSA and tribal law enforcement personnel, apparently accompanied by at least one of Richard's sons, went to Richard's house at about 11:30 p.m. on September 23, 1993, and removed him.

That same night, Richard was taken to two hospitals, the Muskogee Regional Medical Center (MRMC) in Muskogee and the Creek Nation Indian Health Service Hospital in Okemah, Oklahoma. Neither hospital admitted him. On September 24, 1993, he was taken to his sister's home in McIntosh County, Oklahoma. Her home was located on restricted land within appellant's territory. 3/

Richard's guardian sought assistance in State court. On September 24, 1993, a State court judge ordered the Sheriff of McIntosh County to return Richard to his home in Muskogee. The Sheriff declined to enforce the order on the grounds that the property on which Richard was then located was Indian country under appellant's jurisdiction.

On September 27, 1993, the Tribal court conducted a show cause hearing at which Richard's wife, Radene, was present. At the close of the hearing, the court extended its September 23 emergency order until October 14, 1993.

Also on September 27, 1993, the State court judge and Richard's guardian filed a habeas corpus petition in Federal district court. The Hon. Thomas Alford & Albert R. Matthews v. Creek Nation, No. Civ. 93-749-S (E.D. Okla.). Following hearings on September 29 and 30, 1993, the court held that it had jurisdiction over the habeas corpus petition. It also held, however, that the petitioners must first exhaust tribal court remedies.

The Tribal court hearing set for October 14, 1993, was postponed until November 5, 1993, at the request of the attorney for Richard's guardian. Either prior to or at the November 5 hearing, appellant and Richard's guardian reached an agreement whereby appellant agreed to drop its Tribal court suit and intervene in the proceedings in State court. Appellant's Tribal court case was therefore dismissed on November 5, 1993. 4/

2/ Both orders were filed with the court clerk on the following day, Sept. 24, 1993.

3/ On Sept. 26, 1993, Richard was taken by ambulance from his sister's home to the Claremore Indian Health Service Hospital in Claremore, Oklahoma. The record does not show how long he stayed there, but he was returned at some time to his sister's home.

4/ The record does not show the basis for the agreement or the dismissal. However, according to newspaper articles included in the record, the dismissal was granted shortly after BIA determined that Richard's home in Muskogee, from which he was removed by appellant, was located within Cherokee territory, rather than appellant's territory.

It appears unlikely that this fact was known at the time of the hearing in Federal court, as there is no mention of it in the transcript of those proceedings. The Board is not aware of any determination as to whether appellant acted outside its authority in removing Richard from a location within Cherokee territory.

On November 8, 1993, Richard's guardian filed an application in State court for delivery of Richard to the MRMC. The application was granted on the same date, and Richard was transported to the MRMC on November 9, 1993.

On November 22, 1993, the manager of appellant's CFSA requested that the Superintendent disburse funds from Richard's IIM account to pay certain medical bills incurred during the period September 23 through November 5, 1993. He submitted bills totalling $3,545.45 and indicated that he had previously contacted Richard's guardian, who had refused to recommend payment.

The Superintendent declined the request on November 29, 1993, stating: "This determination is based on Eastman Richard's state appointed Guardian responsibilities and authorities over [Richard's] estate. We realize [BIA's] trust responsibilities over [Richard], however, [BIA] has in the past conducted Richard's affairs through his guardian, Mr. Albert R. Matthews."

Appellant appealed this decision to the Area Director, who affirmed it on February 25, 1994. In his decision, the Area Director observed that, of the ten bills submitted to BIA for payment, only three were addressed to appellant. He continued:

> The remaining seven (7) invoices were sent directly to Eastman Richard, Jr., for payment. Neither the Creek Nation nor any office or agency thereof is listed on these invoices. As far as we are aware, the funds regarding these seven (7) bills are not owed the Creek Nation nor has the Creek Nation agreed to pay these bills. Accordingly, the Creek Nation of Oklahoma has no interest, right, or privilege regarding the payment of the bills that were sent to Mr. Richard.
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> * * * * * *
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> We have received no communication from Mr. Richard's family evidencing their desire that the Creek Nation represent their interests in this matter. Accordingly, we do not believe the Creek Nation is "adversely affected" by the Superintendent's decision as it pertains to the seven (7) bills that were sent to Mr. Richard. Therefore, the Creek Nation lacks "standing" to appeal the Superintendent's decision as to those seven (7) bills.

(Area Director's Feb. 25, 1994, Decision at 2).

With respect to the three bills addressed to appellant, the Area Director held that the Superintendent's decision concerning them was discretionary under 25 CFR 115.5. 5/ He further held that, because Richard's

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5/ 25 CFR 115.5 provides:

"The funds of an adult who is non compos mentis or under other legal disability may be disbursed for his benefit for such purposes deemed to be

guardian had objected to payment of the bills, "the issue is whether the funds should be released by [BIA] for purposes deemed to be in Mr. Richard's best interest." Id. at 3. He continued:

> Because Mr. Richard was not admitted by either of the hospitals to which he was initially transported on September 23, 1993, it appears that Mr. Richard may not have been in imminent peril had he remained in his home in Muskogee. Therefore, the facts suggest that the removal of Mr. Richard from his home was a judgment call on the part of the Creek Nation and not necessarily in his best interests. Accordingly, it was reasonable for the Superintendent to conclude that the payment of expenses incurred during Mr. Richard's absence from his Muskogee home was not in his best interests. Due to the unilateral nature of the Creek Nation's actions regarding this situation, it may be more appropriate for the Creek Nation to bear the costs of this endeavor.
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> As you know, Mr. Richard passed away on December 16, 1993. [25 CFR 115.12 provides] in relevant part that "[f]unds of a deceased Indian of the Five Civilized Tribes may be disbursed to pay . . . claims found to be just and reasonable which are not barred by the statute of limitations . . . and claims allowed pursuant to part 16 of this chapter." [6/] The question now becomes whether it could be considered just and reasonable for the Creek Nation to unilaterally obligate Mr. Richard's IIM Account funds.
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> An examination of the three (3) invoices for which the Creek Nation has standing indicates that the bills were incurred during October 21-29, 1993. As stated previously, Mr. Richard was removed from his home on September 23, 1993, and taken to two (2) hospitals, both of which released him. This suggests that the Creek Nation should have been satisfied that Mr. Richard was not, in fact, being abused and could have returned Mr. Richard to his home in Muskogee. This was not done.

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fn. 5 (continued)
for his best interest and welfare, or the funds may be disbursed to a legal guardian or curator under such conditions as the Secretary or his authorized representative may prescribe."

6/ 25 CFR 115.12 provides in its entirety:

"Funds of a deceased Indian of the Five Civilized Tribes may be disbursed to pay ad valorem and personal property taxes, Federal and State estate and income taxes, obligations approved by the Secretary of [sic] his authorized representative prior to death of decedent, expenses of last sickness and burial and claims found to be just and reasonable which are not barred by the statute of limitations, costs of determining heirs to restricted property by the State courts, and claims allowed pursuant to part 16 of this chapter [concerning probate of the estates of members of the Five Civilized Tribes]."

> In fact, the evidence shows that Mr. Richard was taken to his sister's home located on "restricted lands" within the Creek Nation and eventually was returned to MRMC in Muskogee on November 9, 1993. Therefore, we believe that the October 21-29, 1993, bills are not just and reasonable and should not be paid from Mr. Richard's IIM Account. [Emphasis in original.]

Id. The Area Director also rejected appellant's contention that the Superintendent had agreed at the September 22, 1993, meeting to disburse funds from Richard's IIM account to pay bills incurred by appellant. Id. at 3-4.

On March 11, 1994, appellant again requested the Superintendent to pay the bills from funds in Richard's IIM account. Citing 25 CFR 115.12, appellant now sought payment in the amount of $3,787.45.

On March 30, 1994, appellant appealed the Area Director's February 25, 1994, decision to the Board.

The Superintendent responded to appellant's March 11, 1994, request on March 24, 1994, stating that he was not authorized to act on appellant's request because the probate of Richard's estate had been initiated and because appellant's first request for payment was subject to administrative appeal.

Appellant appealed the Superintendent's March 24, 1994, decision to the Area Director, who issued a decision on May 24, 1994, stating:

> As you are aware, there is currently pending before the Interior Board of Indian Appeals, an appeal of this office's February 25, 1994, decision on this exact issue and fact situation. Therefore, we have some doubt as to whether the Superintendent has jurisdiction to issue an appealable "decision," within the meaning and intent of 25 C.F.R. Part 2.
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> Accordingly, the Superintendent's March 24, 1994, "decision," the above discussion regarding jurisdiction notwithstanding, is hereby affirmed.

(Area Director's May 24, 1994, Decision at 1).

Appellant appealed this decision to the Board, requesting that its new appeal be consolidated with its earlier one. The Area Director moved to dismiss the second appeal. The Board took the Area Director's motion under advisement, giving appellant an opportunity to respond to it when it filed its opening brief. The Board consolidated the two appeals when it docketed the second appeal.

Motion to Dismiss Appeal in Docket No. IBIA 94-132

The Area Director seeks dismissal of appellant's second appeal on the grounds that the Superintendent lacked jurisdiction to issue an appealable

decision on March 24, 1994. Jurisdiction was lacking, the Area Director contends, because appellant's second request for payment raised the same facts and issues addressed in the Area Director's February 25, 1994, decision, and the time for appealing that decision had not expired. In response, appellant contends that the Area Director's February 25, 1994, decision was not based on the same facts and issues, because appellant's second request for payment was made under 25 CFR 115.12, whereas its first request was not made under that provision.

Appellant's first request for payment did not cite any statutory or regulatory basis for the request. The Superintendent's November 29, 1993, decision likewise cited no statutory or regulatory authorities. The Superintendent's decision cannot be construed as having impliedly interpreted 25 CFR 115.12, because Richard was still living on November 29, 1993, the date the decision was issued. However, by the time the Area Director issued his February 25, 1994, decision, Richard had died, and the Area Director therefore discussed 25 CFR 115.12 in his decision.

[1] Appellant contends that, because its first request for payment was not made under 25 CFR 115.12, and because it did not rely on this provision in its statement of reasons before the Area Director, 7/ the Area Director erred in addressing the provision in his February 25, 1994, decision. The Board rejects this contention. At the time the Area Director issued his February 25, 1994, decision, 25 CFR 115.12 was relevant to the issue at hand. It was entirely appropriate for the Area Director to consider all relevant statutory and regulatory provisions whether or not they were relied on by appellant. See, e.g., Hartman v. Anadarko Area Director, 23 IBIA 122 (1992) (An Area Director has authority to address an issue which comes to light during the course of an appeal even though the issue has not been raised by a party to the appeal).

In any event, assuming that appellant was somehow deprived of an opportunity to make its arguments concerning 25 CFR 115.12 before the Area Director, 8/ any such deprivation has been cured in these proceedings, because appellant has had ample opportunity to make its arguments before the Board. See, e.g., Jerome v. Acting Aberdeen Area Director, 23 IBIA 137 (1992).

Rather than dismiss this appeal, the Board finds it more appropriate to summarily affirm the Area Director's May 24, 1994, decision. Accordingly, that decision is affirmed.

Discussion and Conclusions

[2] Before addressing appellant's arguments in Docket No. IBIA 94-99-A, the Board reviews the rules which must guide the Board's

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7/ Appellant did in fact cite 25 CFR 115.12 in its statement of reasons before the Area Director. It contends, however, that it did not rely on that provision because it did not include it in its prayer for relief.

8/ In fact, appellant could easily have made its arguments concerning 25 CFR 115.12 in its Jan. 28, 1994, statement of reasons.

decision here. First and foremost is the principle that, in determining what claims may be paid from an IIM account, BIA "is bound by the trust responsibility of the United States toward the Indians for whom the funds are held." Miller v. Anadarko Area Director, 26 IBIA 97, 102 (1994). See also, e.g., United States v. Mitchell, 463 U.S. 206, 225 n.29 (1983); United States v. Acting Aberdeen Area Director, 9 IBIA 151, 153-54, 89 I.D. 49, 51 (1982).

The second relevant rule concerns the standard of review applicable here. BIA's decisions concerning the payment of claims from IIM accounts are based on the exercise of discretionary authority. See 25 CFR 115.5 ("The funds of an adult who is non compos mentis or under other legal disability may be disbursed * * *."); 25 CFR 115.12 ("Funds of a deceased Indian of the Five Civilized Tribes may be disbursed * * *. 11) ; Miller, 26 IBIA at 102. The Board has often stated that, where a BIA decision is based on the exercise of discretionary authority, the Board does not substitute its judgment for that of BIA. Rather, the Board's responsibility in such cases is to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion. E.g., Blackhawk v. Billings Area Director, 24 IBIA 275 (1993). Even in the case of a discretionary decision, the Board requires that the BIA deciding official explain the reasons for his/her decision. E.g., ZCA Gas Gathering, Inc. v. Acting Muskogee Area Director, 23 IBIA 228, 239-40 (1993). Further, to the extent the BIA deciding official reaches a legal conclusion, the Board has authority to review that conclusion. E.g., Baker v. Muskogee Area Director, 19 IBIA 164, 169, 98 I.D. 5, 7 (1991).

[3] In this case, the Area Director concluded that appellant lacked standing to appeal concerning seven bills which were not addressed to appellant. This is a legal conclusion which the Board has full authority to review. As it happens, however, appellant fails to challenge the Area Director's conclusion on standing. The Area Director reiterated his conclusion and the reasons therefor in his answer brief before the Board. Appellant thus had a second opportunity to respond to the Area Director's conclusion in its reply brief. It did not do so.

The administrative record supports the Area Director's conclusion. It is entirely devoid of any evidence that appellant was responsible for paying these seven bills, all of which were addressed to Richard, not to appellant.

Appellant has failed to carry its burden of proving error in the Area Director's conclusion on this point. The Board therefore affirms the Area Director's conclusion that appellant lacks standing with respect to the seven bills. The only bills remaining in dispute are three bills from Kimberly Quality Care, totalling $1,565.16.

Appellant contends that the Area Director's decision is not supported by substantial evidence and is not based on a best interests analysis. As discussed above, the Board reviews discretionary BIA decisions to ensure that proper procedures were followed and that BIA gives reasons for its decision. In this case, the Area Director reviewed appellant's request under the appropriate regulatory provisions, applying the standards set out

in those provisions, and gave reasons for his conclusion that appellant's request failed to meet the standards. Contrary to appellant's assertion, the Area Director used a best interests analysis, concluding that disbursement of funds from Richard's IIM account was not in Richard's best interest. The Board rejects appellant's arguments on these points.

Appellant next contends that BIA is estopped from declining to pay the claims because the "Superintendent promised to pay the bills of * * * Mr. Richard should CFSA decide to take Mr. Richard into custody" (Appellant's Opening Brief at 6). Appellant submits statements from appellant's Principal Chief and two tribal employees, stating that the Superintendent made this commitment at the September 22, 1993, meeting. The Superintendent denies making such a commitment: "I did not promise that I would pay for the bills. I did state that according to 25 CFR, I do have the authority to pay for bills from the Individual Indian Money account" (Superintendent's Feb. 8, 1994, Memorandum at 2 (emphasis in original)).

There is clearly a factual dispute here. Appellant seeks an evidentiary hearing for the purpose of resolving that dispute. The Board finds it unnecessary to order an evidentiary hearing in this case, however, because it finds that, even assuming appellant's factual allegations are correct, it cannot succeed with its estoppel argument.

In Office of Personnel Management v. Richmond, 496 U.S. 414 (1990), the Supreme Court held that estoppel does not run against the Government in a case where the claimant seeks payment of money from the Treasury. While it declined to adopt a flat rule that estoppel will not run against the Government in any case, 496 U.S. at 423, the court made it clear that estoppel in other cases (i.e., those not involving payment of public funds) could be found, if at all, only in extraordinary situations: "Whether there are any extreme circumstances that might support estoppel in a case not involving payment from the Treasury is a matter we need not address" Id. at 434. The Court also noted that it had "reversed every finding of estoppel [against the Federal Government] that [it had] reviewed." Id. at 422.

[4] This case does not involve the payment of funds from the Treasury, so that part of the Court's analysis in Office of Personnel Management which concerns the Appropriations Clause of the United States Constitution, Art. I, § 9, cl. 7, is not directly applicable. However, the funds from which appellant seeks reimbursement are funds in an IIM account, with respect to which, as discussed supra, the United States bears a trust responsibility. The actions of the Federal Government concerning these funds must, in the words of the Supreme Court, "be judged by the most exacting fiduciary standards." Seminole Nation v. United States, 316 U.S. 286, 297 (1942). The Board concludes that this fiduciary responsibility requires that the United States afford trust funds in its custody at least the same protection it affords public funds. Cf. Restatement (Second) of Trusts § 176 (1959); 2 A. Scott on Trusts § 176 (1967). Accordingly, the Board will not recognize estoppel against BIA where the claimant seeks payment of money from funds held in trust for Indians.

Even if it had not adopted the rule just announced, the Board would not find estoppel in this case. In cases preceding Office of Personnel Management, the Supreme Court made it clear that a person seeking to estop the Government bears a heavy burden and must, at the least, demonstrate that the traditional elements of estoppel are present. Heckler v. Community Health Services, 467 U.S. 51, 60-61 (1984).

The traditional elements of estoppel are: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted upon or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury. See Morris v. Andrus, 593 F.2d 851, 854 (9th Cir. 1978), cert. denied, 444 U.S. 863 (1979). See also, e.g., Bradshaw v. Acting Muskogee Area Director, 18 IBIA 339 (1990); Falcon Lake Properties v. Assistant Secretary--Indian Affairs, 15 IBIA 286 (1987).

Here, it is apparent that not even the first element is present. There is no evidence in the record, nor does appellant contend, that the Superintendent was aware on September 22, 1993, that events would transpire as they did and, in particular, that appellant would retain custody of Richard, over the objection of his wife and his guardian, even after it became apparent that he was not being abused. While appellant itself may well have been unaware on September 22, 1993, that things would go as badly as they did, it was in a better position than the Superintendent to assess the possibilities. Thus, it cannot be said that appellant was ignorant of facts of which the Superintendent was aware. Nor can it be said that the Superintendent concealed any facts from appellant. Therefore, even if estoppel could be found in a case involving the payment of Indian trust funds, it cannot be found under the facts of this case.

Next, appellant contends that the Superintendent's decision was based on a misunderstanding of the role of State-appointed guardians under the 1947 Act. It was inappropriate for the Superintendent to blindly follow the recommendations of the guardian in this case, appellant contends, because section 5 of the 1947 Act gives the Secretary jurisdiction over restricted funds of members of the Five Civilized Tribes.

The decision on appeal here is the Area Director's decision, not the Superintendent's decision. Even if the Superintendent based his decision solely on the guardian's recommendation, as he evidently did, the Area Director conducted an independent analysis of the matter, applying the standards of the relevant regulations to the facts of the case. It is apparent that the Area Director did not "blindly follow" the guardian's recommendation. Accordingly, appellant's contention concerning the Superintendent's decision provides no basis for reversing the Area Director's decision.

Appellant has failed to show error in the Area Director's February 25 1994, decision.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's February 25, 1994, decision and the Acting Area Director's May 24, 1994, decision are affirmed.

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Anita Vogt
Administrative Judge

I concur:

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Kathryn A. Lynn
Chief Administrative Judge